

IACONA (Migration) [2019] AATA 2679 (24 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr VINCENZO IACONA

CASE NUMBER: 1717019

HOME AFFAIRS REFERENCE(S): BCC2016/590307

MEMBER: Hugh Sanderson

DATE: 24 May 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A

Statement made on 24 May 2019 at 3:23pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing de facto relationship – sponsor financially dependent on applicant – care and support of sponsor’s children from previous relationship – additional criteria for de facto relationships – 12-month requirement – registered under relevant State law – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 10 February 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the parties had been in a de facto relationship for at least the period of 12 months ending immediately before the date of the application and did not meet the requirements of r.2.03A(3).

Background

5. The applicant is a citizen of Italy and is currently 41 years old. The sponsor of the applicant is Tracy Lacy. She is a citizen of the United States of America and is currently 38 years old. She was granted a subclass 801 Partner (Residence) visa in 2009 and now has the right to reside permanently in Australia. She separated from her former husband in June 2012. They have two children, Kayne currently 12 years of age and Ayla currently eight years of age. The sponsor has another child, Raven, who is 20 years old and lives in the United States.
6. In his application, the applicant stated as follows:
 7. We met for the first time in a cafe in The Entrance, it was a week after I arrived in Australia and I was at the cafe of a friend that I was staying with, Tracy came to have breakfast with the kids and my friend introduced us, my English was bad and Tracy offered to give me some lessons, a little later we started meeting, mostly over the weekend because around 1 September 2014, I moved to Sydney where I started studies and got a job as a carpenter. On the 11th of January 15, we decided to start a unique relationship shortly before finishing my studies I left work to spend more time with what had become my new family.
8. The applicant provided various documents in support of the application including photos of the parties together with the sponsor's children, statements from friends in support of the application, bank statements and other documents.
9. The Department wrote to the applicant on 27 May 2017 noting that as the parties were claiming to be in a de facto relationship. The Department noted the parties were required to show that they had been living in a de facto relationship for at least 12 months prior to applying for the visa or evidence that the de facto relationship had been registered or there were compelling and compassionate circumstances why the visa should be granted. The sponsor responded providing further documents.
10. Included in the documents provided, was correspondence addressed to the applicant with a redirection sticker. It was claimed that the applicant had requested a redirection of his mail which expired on 17 July 2016. It was claimed this proved they had been living together since January 2016. The sponsor stated that "This is how far we can go".

11. The delegate who considered the application noted the following issues:
- There was limited information as to the financial aspects of the relationship with the earliest document provided dated 13 October 2016 after the application had been filed and there was no information about any financial aspects of the relationship prior to the application being filed;
 - The earliest information of the parties sharing a household together is dated 18 January 2016 and there was no information the parties had a common household at least 12 months prior to the application;
 - The statements from friends indicate that they had met the parties and believed they were in a relationship, however, they did not refer to when the relationship started;
 - There was no information of any social activities of the parties where they represented themselves as being in a de facto relationship for the 12 months prior to the application being filed;
 - From the statements provided, it appeared that the parties were boyfriend and girlfriend from 11 January 2015, however, they did not make any emotional commitment to a long-term relationship until about the time the application was filed; and
 - There was no information of any compelling or compassionate circumstances for the grant of the visa or evidence that the de facto relationship had been registered.
12. The delegate was satisfied that at the date of the application and at the date of the decision the parties were in a de facto relationship. However the delegate was not satisfied the parties had been in the de facto relationship for at least the period of 12 months ending immediately before the application and did not meet the criteria in r.2.03A(3). The delegate found the applicant did not meet the criteria in cl.820.211(2) and refused the application.
13. The applicant appeared before the Tribunal on 25 March 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
14. The parties provided consistent information as to various aspects of their relationship. This included details of where they were living, their financial arrangements, the contact arrangements the review applicant's children have with their biological father and other aspects of their lives together.
15. The applicant said that they considered his de facto relationship with the sponsor started on 11 January 2015 which was when they had a conversation and decided to commit to each other. He said that he was studying in Sydney and had a job there and so was not able to live full-time with the review applicant at home in The Entrance. He said that he spent almost every weekend living with the review applicant. He said that when he was studying and working in Sydney he was living in a share home in Leichhardt.
16. The applicant said that he arranged to study in Sydney because he had consulted someone and they suggested a particular course. He did not see if there were appropriate courses available on the Central Coast. He said that when he got work on the Central Coast in July 2015 he started living full-time in the sponsor's home. He continued his studies in Sydney two or three days per week, travelling by train each day.
17. The parties provided details of the sponsor's children's lives. They are currently seeing their biological father most weekends. This has only recently started. They provided details of the

relationship the children have the applicant and the support he has given to them and to the sponsor in light of the family violence that occurred during her relationship with their father. The sponsor is not working and is financially dependent upon the applicant.

18. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in the present case is whether the applicant is the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner. The delegate found that the applicant did not meet the criteria in r.2.03A which, in part, requires that the parties have been in a de facto relationship for at least a period of 12 months ending immediately before the date of the application unless certain requirements are met. The Tribunal has considered all aspects of whether the applicant in meets the criteria in cl.820.211 and cl.820.221.

Whether the parties are in a spouse or de facto relationship

20. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

21. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
22. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects

23. The parties provided information as to their financial arrangements. The sponsor is not working and is financially dependent upon the income of the applicant for her and her children's support. The details of the applicant's bank account show that he has continued to meet the household expenses for the parties. The parties provided consistent information as to their financial arrangements including their shopping habits indicating they are sharing their day-to-day household expenses. As neither the applicant nor the sponsor have any significant assets of their own, it is not surprising that they do not have any significant joint assets.
24. Overall, the Tribunal finds that the financial aspects of the relationship both at the time of the application and at the time of this decision support a finding that the parties are living together and are in a genuine and continuing relationship.

Household

25. The parties were at the time of the application and continue to be living together in a shared residence on the Central Coast. Evidence has been provided of correspondence being sent to the applicant and the sponsor at the homes they have shared. They provided consistent information as to the arrangements within their home including the sharing of housework and other domestic chores.
26. Significantly, the sponsor has three children from former relationships, two of whom live with her and one who continues to live in the United States. The applicant is actively involved in the care and support of the two children in Australia. He has a close relationship with them and is involved in all aspects of their life. He is aware of the arrangements that are in place for the children to see their biological father.
27. The evidence supports a finding that the parties are living together in a shared household in a genuine and continuing relationship. The evidence supports a finding the parties have a mutual commitment to a shared life to the exclusion of all others.

Social aspects

28. The parties are provided consistent information as to the social aspects of the relationship. This includes travel they have done together in Australia as well as various social activities they have participated in with their friends and family. Photos have been provided of themselves at various social events. Statements have been provided by friends supporting the application.
29. The Tribunal finds the parties represent themselves as being in a de facto relationship with each other and that their relationship is recognised and accepted by their friends and family members. They have undertaken numerous social activities together and have plans for future activities.

Commitment

30. The parties first met each other in July 2014 and considered they committed to a de facto relationship in January 2015. At that time, the applicant was undertaking a course of study and working in Sydney while the sponsor continued to reside with her children on the Central Coast. The applicant would spend most weekends when not working or studying with the sponsor in her home on the Central Coast. It was only in January 2016 that the applicant was able to move in to live with the sponsor permanently on the Central Coast. They have now been living together for over three years.
31. The applicant has been actively involved in the care and support of the sponsor's children. It is clear the applicant and the sponsor provide each other a high degree of companionship and emotional support to each other. They are committed to their relationship and consider their relationship as long-term.

Overall assessment

32. The Tribunal is satisfied that the weight of evidence supports a finding that at the time of the application and at the time of this decision the parties have been living together in a genuine and continuing relationship. They provide each other emotional support and have a mutual commitment to a shared life to the exclusion of all others. The parties are not related by family.

33. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cl.820.211(2)(a).
34. The Tribunal finds the applicant was, at the time of the application sponsored by his de facto partner who had turned 18 years of age. He continues to be sponsored by her. Therefore the applicant meets cl.820.211(2)(c).
35. At the time of the application, the applicant held a substantive visa and the requirements in cl.820.211(2)(d) are not relevant. Accordingly the applicant meets all the criteria in cl.820.211(2).
36. As the applicant continues to meet the criteria in cl.820.211(2) at the time of this decision, the Tribunal finds the applicant meets the criteria in cl.820.221.

Are the additional criteria for a de facto relationship met?

37. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
38. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
39. It is noted that the delegate refused the application, despite finding the parties were at the time of the application and at the time of the delegate's decision in a genuine relationship, as the the delegate found the parties had not been living in a de facto relationship for at least the 12 month period ending immediately before the date of the application. The applicant has now provided evidence that the relationship is registered under the Births Deaths and Marriages Registration Act (NSW) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
40. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).